



**Pennsylvania
Commission
on
Sentencing**

Harrisburg Location:
408 Forum Building
Capitol Complex

Mail:
PO Box 1045
Harrisburg, PA
17108-1045

Phone:
717.772.2150

Fax:
717.772.8896

URL:
<http://pasentencing.us>

**Senator Mary Jo White
Chair**

**Villanova Law Professor
Steven L. Chanenson
Vice Chair**

**Mark H. Bergstrom
Executive Director**

TESTIMONY

Senate Judiciary Committee

Public Hearing on *Miller v. Alabama* Relating to Juvenile Lifers

**North Office Building
Hearing Room 1
Harrisburg, PA**

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**Mark H. Bergstrom
Executive Director**

Good morning Chairman Greenleaf and members of the Senate Judiciary Committee. I am Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing. Thank you for scheduling this timely hearing on a matter of critical importance to both victims of crime and to juvenile lifers, and for providing this opportunity to testify. I would like to recognize two members of this Committee who serve on the Commission: Commission Chairman Senator Mary Jo White and Senator Daylin Leach. I would also like to recognize the contribution of the Commission's Vice-Chairman, Villanova Law Professor Steven Chanenson, in the preparation of this testimony. The Commission has not met since the decision in *Miller v. Alabama* was announced, and so my remarks will focus on identifying key issues and potential actions for consideration by the Committee, rather than offering specific recommendations.

With the focus of today's hearing on how Pennsylvania should implement *Miller v. Alabama*, it may be useful to begin with a brief description of the process by which an individual less than 18 years of age is subject to a sentence of 'life imprisonment without parole.' Quite simply, the Juvenile Act excludes certain crimes alleged to have been committed by a child (less than 18 years of age) from the definition of 'delinquent act'¹, resulting in the automatic transfer of the child for criminal prosecution². The crimes removed from Juvenile Court jurisdiction include murder, regardless of age of the offender, as well as certain other violent crimes, alleged to have been committed by a child 15 years of age or older when special circumstances are present (i.e., alleged crime was committed with a deadly weapon, or child was previously adjudicated delinquent for conduct that would be classified as one of the listed crimes).

Assuming the juvenile is not transferred from criminal proceedings³, the sentencing options available to the Court upon conviction have traditionally been the same as those for

¹ 42 Pa.C.S. §6301

² 42 Pa.C.S. §6355

³ 42 Pa.C.S. §6322

adult offenders.⁴ In the case of a conviction for Murder of the First⁵ or Second Degree⁶, which also should include consideration of Murder of a Law Enforcement Officer of the First or Second Degree⁷, First or Second Degree Murder of Unborn Child⁸, and Arson Endangering Persons which causes a death⁹, the only sentencing option is life imprisonment without parole (LWOP).

While not defined as first or second degree murder, a conviction for the offense of Weapons of Mass Destruction (when the use of a weapon results in the death of an individual)¹⁰ requires a sentence to life imprisonment. Similarly, when an offender convicted of third degree murder has been previously convicted of murder or voluntary manslaughter, the Commonwealth may proceed under the Life Imprisonment for Homicide mandatory sentencing provision¹¹, limiting the Court's sentencing options to life imprisonment.

All of these crimes are within the ambit of *Miller v. Alabama*, in that they are homicides for which a juvenile could be prosecuted in criminal court, and they are offenses for which the sole sentencing option for a juvenile offender is LWOP. In Pennsylvania, there are other non-homicide offenses and mandatory sentencing provisions which permit or require life imprisonment. These include: Sentences for Sex Offenders¹², in which the Commonwealth may invoke a LWOP mandatory for a third or subsequent conviction for a Megan's Law offense; Sentences for Second and Subsequent Offenses¹³, in which the Court may sentence a person convicted of a third or subsequent crime of violence; Assault by Life Prisoner¹⁴, for which the

⁴ Two exceptions are linked to recent United States Supreme Court decisions. In *Roper v. Simmons* (2005), the Court held that the execution of a juvenile (less than 18 years of age at the time of the offense) is unconstitutional. In *Graham v. Florida* (2010), the Court held a sentence of life imprisonment without the possibility of parole for a juvenile convicted of a non-homicide offense is also unconstitutional.

⁵ 18 Pa.C.S. §2507(a)

⁶ 18 Pa.C.S. §2507(b)

⁷ 18 Pa.C.S. §2507(a) and (b)

⁸ 18 Pa.C.S. §2604(a) and (b)

⁹ 18 Pa.C.S. §3301(a)(2)

¹⁰ 18 Pa.C.S. §2716(c)(2)

¹¹ 42 Pa.C.S. §9715

¹² 42 Pa.C.S. §9718.2

¹³ 42 Pa.C.S. §9714(a)(2)

¹⁴ 18 Pa.C.S. §2704

penalty is LWOP; Rape of Child (< 13 years of age, serious bodily injury)¹⁵, for which the maximum penalty is life imprisonment; IDSI of Child (< 13 years of age, serious bodily injury)¹⁶, for which the maximum penalty is life imprisonment. In considering changes to sentences for first and second degree murder by juvenile offenders, it is important to consider any changes required to other offenses in order to promote or maintain uniformity and proportionality.

Earlier this year, the Pennsylvania Department of Corrections identified 373 inmates serving LWOP sentences for homicide who were less than 18 years of age at the time of sentencing; they estimated as many as 279 additional inmates serving LWOP for homicide who were between 18 and 19 years of age when sentenced, for a total of 652 LWOP inmates¹⁷. The actual number of LWOP inmates who were less than 18 years of age at the time of the homicide is somewhere between these two values, and has been reported in at least one newspaper as an estimated 470 inmates¹⁸. As a point of comparison, over the course of the last five years, approximately 10 LWOP sentences per year have been reported to the Commission¹⁹ for juvenile offenders convicted of Murder 1 or Murder 2.

In *Miller v. Alabama*, the Court held that the 8th Amendment to the United States Constitution "... forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders." This is not to say that LWOP for a juvenile convicted of murder is not a permitted sentence, but rather that LWOP cannot be the only sentencing option. The Majority reasoned that the Constitution requires "... that punishment for crime should be graduated and proportioned to both the offender and the offense" by considering the culpability of a class of offenders as well as the characteristics of the individual defendant and the details of his offense. This requires "individualized sentencing in capital cases" and the ability of the sentencing court "to consider the mitigating qualities of youth." And while it has

¹⁵ 18 Pa.C.S. §3121(c)(2)

¹⁶ 18 Pa.C.S. §3123(d)(2)

¹⁷ PA Department of Corrections, Office of Planning, Research & Statistics (January 2012)

¹⁸ Pittsburgh Post-Gazette, Moriah Balingit (June 26, 2012, referencing Juvenile Law Center)(July 4, 2012)

¹⁹ PA Commission on Sentencing, Annual Reports (based on most serious offense of criminal incident)(2007 = 6; 2008 = 11; 2009 = 11; 2010 = 9; DRAFT 2011 = 10)

been argued that 'transfer-stage discretion,' such as a hearing to consider a transfer from criminal proceedings, is an adequate forum for weighing the 'mitigating qualities of youth,' the Supreme Court found that "... the transfer decision may present a choice between a light sentence as a juvenile and standard sentencing as an adult. It cannot substitute for discretion at post-trial sentencing."

Any 'Miller solution' constructed for Pennsylvania will need to provide both a process for the review of the offender and the offense as well as sentencing option(s) that provide Courts with the discretion required to impose proportionate sanctions for juvenile offenders. It is clear that the review process is intended to address age and age-related characteristics and the nature of the crimes in order to support the imposition of a proportionate sentence. Referencing earlier decisions, the Court reiterated the importance of chronological age of the minor as a "mitigating factor of great weight" and that "the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability." The Majority faults a system with mandatory LWOP as preventing the sentencing court from considering a juvenile's immaturity and his failure to appreciate risks and consequences, his family and home environment, the extent of his participation in the crime, the way familial and peer pressures may have affected him, his inability to deal with police or to assist his own attorneys, and a disregard of the possibility of rehabilitation.

Considering the scope of information suggested for review, and the Court's repeated references which associate LWOP cases for juveniles with the death penalty, one process the Committee may wish to consider for juvenile homicide cases is a bifurcated hearing. Upon conviction, a judge or jury could consider all relevant factors before deciding a sentence from choices defined in statute. A further refinement of this approach could be the statutory exclusion of LWOP as a sentencing option for juvenile offenders below a certain age.

Moving to the consideration of sentencing options, and assuming LWOP remains one of the sentencing options, other structures that may be considered include 'life imprisonment

with the possibility of parole' as well as 'total confinement' with either mandatory or discretionary minimum and/or maximum terms.

In the case of 'life with parole', the Court would impose a mandatory maximum sentence of life imprisonment, as well as a minimum term to designate the earliest date at which parole could be considered. The minimum term could be defined in statute (i.e., mandatory minimum sentence) or could be discretionary (i.e., sentencing guidelines), or could be a combination of the two (i.e., a range of minimum terms authorized by statute). For purposes of proportionality, consideration should be given to existing mandatory provisions for comparable offenses (e.g., 25 year mandatory minimum for third strike).

Another approach is the enactment of legislation which provides a statutory maximum of life imprisonment (e.g., rape or IDS of child < 13 years of age/serious bodily injury), but permits the court to impose a maximum term of total confinement of less than life imprisonment. As with 'life with parole', the court would be required to impose a minimum term which could be defined in statute (i.e., mandatory minimum sentence) or could be discretionary (i.e., sentencing guidelines), or could be a combination of the two (i.e., a range of minimum terms authorized by statute). The maximum term could be designated in statute as twice the minimum term. In order to avoid conflict with the requirements of *Graham v. Florida*, which prohibits LWOP for juvenile offenders convicted of non-homicide offenses, it is important that this sentencing structure be required in such cases with a statutory maximum of life imprisonment.

A final issue to consider as part of any 'Miller solution' for Pennsylvania is the three temporal categories of cases that may be impacted by this decision: (1) 'pre-Miller' cases involving juvenile lifers convicted and sentenced prior to the decision in *Miller v. Alabama*; (2) 'current' cases involving convictions obtained and /or sentences imposed since the decision but before any corrective legislation is enacted; and (3) 'post-Miller' cases which operate under the 'Miller solution' legislation, which (hopefully) satisfies both constitutional concerns and public policy goals. To the degree 'pre-Miller' and 'current' cases are impacted by this decision, the

'Miller solution' legislation may serve as a template to guide resolution of these cases by the Courts (i.e., Post Conviction Relief Act), the Pennsylvania Board of Pardons (i.e., commutation applications) and/or the Pennsylvania Board of Probation and Parole (i.e., parole review).

The fate of these earlier cases will likely be litigated vigorously as it appears that prosecutors and defense attorneys may have sharply different views about whether the *Miller* rule applies retroactively in collateral proceedings. Legal questions abound, including for purposes of federal habeas petitions whether the *Miller* rule is "substantive" or "procedural." However, the General Assembly has the ability to influence the resolution of these cases as well. If the General Assembly opposes retroactive application, it can make that policy known to prosecutors. If courts nevertheless apply *Miller* retroactively, the General Assembly will want to have its new prospective structure in place as soon as possible to increase the likelihood that those cases will be handled as the Legislature prefers. If the General Assembly, in contrast, sees a value in retroactive application, it can save the litigants and the courts time and expense by creating a process for dealing with these cases. The General Assembly could direct the courts or the PBPP (or encourage the Board of Pardons) to review these sentences in an orderly fashion pursuant to a new legislatively-crafted set of principles. In any event, a quick resolution of this conflict by the General Assembly will reduce the uncertainty surrounding the disposition of hundreds of cases.

Thank you again for holding this hearing and for providing this opportunity to testify. I hope this information is helpful as you consider legislation to implement *Miller v. Alabama* in Pennsylvania.